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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 141

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES

This is an appeal from an order of contempt in a civil antitrust suit brought by the United States, entered following the remand which this Court directed in *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665. The district court held appellants in civil contempt of what it construed as a final judgment of divestiture. Such an order of contempt is directly appealable to this Court under Section 2 of the Expediting Act, 15 U.S.C. 29.[1] For the reasons stated herein, the United States

[1] *E.g.*, *Terminal R.R. Ass'n* v. *United States*, 266 U.S. 17. But even if the judgment of which the appellants were held

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agrees with appellants' contention that the order is erroneous and should be reversed.

STATEMENT

The facts are fully set forth in the Jurisdictional Statement. In brief, they are as follows:

On April 6, 1964, this Court held that the merger between the First National Bank & Trust Co. of Lexington, Kentucky and Security Trust Co. of Lexington violated Section 1 of the Sherman Act. *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665. The Court's opinion did not direct divestiture; it merely reversed the judgment of the district court, which had dismissed the complaint (376 U.S. at 673). The Court's judgment was that the district court judgment—

> be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky for further proceedings in conformity with the opinion of this Court. [J.S. 48a.]

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in contempt was not deemed a final judgment, the order of contempt would still be appealable. There is a rule that when a court, in connection with a proceeding before it, holds a person in civil contempt, such an order is interlocutory and non-appealable until the final judgment in the main case has been entered. *Fox* v. *Capital Co.*, 299 U.S. 105, 107–108; *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 603; Moore, *Federal Practice*, ¶¶ 26,37[3], 54.16, 54.17. But see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, in which the Court, without discussion of jurisdiction, entertained an appeal from such a civil contempt order. In the present case, however, the appellants filed their notice of appeal on the same day on which the district court entered its final decree of divestiture (March 18, 1965), and therefore even under the foregoing rule the order of contempt is appealable.

This Court's judgment was filed in the district court on May 4, 1964. On July 1, 1964 the district court entered an order noting that "[n]o steps of record have been taken by the defendants or any of them to comply with the directive" and directing them by September 1, 1964 "to report to the court the progress made in complying with the judgment". (J.S. 49a–50a). The parties jointly obtained three successive extensions of this order (J.S. 50a, 52a, 53a), so that a hearing on compliance was not held before Judge Swinford until February 16, 1965.

In the period between this Court's decision and the hearing before the lower court on February 16, 1965, the parties negotiated upon the many and complex details of divestiture, consulted with various bank regulatory agencies, and formulated the main steps of a plan of divestiture. This plan was embodied in a proposed interlocutory decree submitted to the court at the hearing (J.S. 3a–4a, 21a–22a, 26a–28a; see proposed decree at J.S. 53a–60a). The court, however, rejected the decree. It entered an order finding that the defendant merged bank had failed "to comply with the mandate of the Supreme Court of the United States, filed in this Court on May 4, 1964"; adjudged that the bank, its executive officers and directors "are in contempt of court"; and fined them $100 a day until they "purge themselves of this contempt by a full compliance with the mandate of the Supreme Court" (J.S. App. 1a, 15a).

On March 1, 1965 the defendants filed a motion to set aside the contempt order (J.S. 110a–113a), and

the government filed another proposed decree of divestiture which would have superseded the contempt order (J.S. 114a–116a). On March 18, 1965, the court (J.S. 116a–117a) (1) overruled the defendants' motion to set aside the contempt order, (2) denied the government's motion to enter its proposed plan of divesture, and (3) entered its own order of divestiture, which is similar to the order originally submitted by the parties at the hearing on February 16, 1965 (Compare J.S. 117a–120a with J.S. 53a–60a).

The district court denied the defendants' motions for a stay of the contempt order. On April 2, 1965 Mr. Justice Stewart stayed the further effectiveness of that order insofar as it imposed the $100-a-day fine (J.S. 121a–122a). The United States supported the defendants' application for such stay, stating that in its view the contempt order was erroneous.

DISCUSSION

The Department of Justice recognizes that the district court's purpose in issuing the contempt order under review was the commendable one of expeditiously securing a plan of divestiture that would conclude this merger litigation satisfactorily. Nevertheless, we are constrained to agree with the appellants that the order below is erroneous.

1. The order of contempt states that, since the defendant merged bank had failed to comply with the mandate of the Supreme Court, "[i]t is therefore the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of

court," a contempt of which they may purge themselves "by a full compliance with the mandate of the Supreme Court". (J.S. 1a). In the course of the hearings below, the district judge stated that the mandate of this Court became an order of the court below when filed there (J.S. 36a). He reiterated that this Court's mandate ordered "the separation of the two banks" (J.S. 5a) "back to where they were on the 28th of February 1961" (J.S. 12a), and that the mandate was a "directive * * * to the defendant" (J.S. 35a). See also the references to compliance with the mandate at J.S. 10a, 50a, 61a–62a.

The difficulty, however, is that the mandate of this Court did not specify any particular relief or direct defendants to take any particular action. It merely reversed the judgment of the district court and remanded the case "for further proceedings in conformity with the opinion of this Court" (J.S. 48a). Thus, even under the district court's theory that the judgment of this Court became the judgment of the district court upon its filing there, still there was no order affirmatively directing the appellants to divest or to do any specific acts until the district court entered its own divestiture order on March 18, 1965. Thus, until the latter order was entered there was no order of which the appellants could validly be held in contempt. *Walling* v. *Crane,* 158 F. 2d 80, 84 (C.A. 5); *Berry* v. *Midtown Service Corp.,* 104 F. 2d 107, 110, 111 (C.A. 2).

2. In the hearings below, the district court indicated a possible alternative ground for holding the

merged bank and its officers and directors in contempt. It stated that it had extended the time to report on the defendants' progress in complying with the mandate of this Court upon the parties' "representation * * * that they were endeavoring to effect a comprehensive separation of the business between" the two banks (J.S. 62a); and that notwithstanding these representations "this bank and its directors and executive officers have been dragging their feet and temporizing with the Court, which I consider a contempt of Court" (J.S. 36a). The court stated that although the bank was "capable of demerging in a matter of weeks," "nothing was done" to effectuate separation (J.S. 35a, 39a), and that the merged bank continued promotional activities as the combined institution and even expanded operations (J.S. 5a, 10a, 12a, 36a–37a).

As we read the district court's order of contempt, however, it was rested solely upon the defendants' alleged non-compliance with this Court's judgment. Before the court could have held the defendants in contempt for other activities or omissions, it would have been required to explore the representations of the defendants and of the government that, during the period after this Court's judgment, the defendants had acted diligently in endeavoring to develop an effective plan of divestiture. If necessary, the court could have held an evidentiary hearing on that issue. As the record stands, however, we see no basis upon which those other activities could sustain the judgment before the Court.

CONCLUSION

For the reasons stated, we agree with appellants' conclusion that the order of contempt should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DONALD F. TURNER,
Acting Assistant Attorney General.

LIONEL KESTENBAUM,
LAWRENCE VELVEL,
Attorneys.

JUNE 1965.

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